THE HON'BLE SRI JUSTICE B. PRAKASH RAO

AND

THE HON'BLE SRI JUSTICE M. VENKATESWARA REDDY

WRIT PETITION NO.3037 OF 2007

ORDER: (Per Hon'ble Sri Justice B. Prakash Rao)

The petitioner herein, who is an Army Personal in the Army service, supported by an affidavit sworn to by Smt. Yalla Padmavathi, his mother filed this Writ Petition, *inter alia,* seeking a Writ of Habeas Corpus directing the third respondent herein to produce the petitioner, who is the detenu therein and declaring the entire proceedings of the Summary Court Martial dated 20.01.2007 conducted by the second respondent herein and convicting the detenu and dismissing from army service and awarding rigorous imprisonment three months in civil prison as arbitrary, illegal, unjust, violative of the mandatory provisions of the Indian Army Act, 1950 and the Army Rules, 1954 and the principles of natural justice and consequently direct reinstatement of the detenu into Army Service with all consequential benefits.

Heard Sri C.M.R.Velu, learned counsel appearing for the petitioner, Sri A.Rajasekhar Reddy, Assistant Solicitor General and Sri K. Narahari, Standing Counsel for Central Government and the learned Advocate General appearing on behalf of the respondents herein.

The case of the petitioner as set out in the affidavit is that he was a combatant member of Indian Army and he was Gunner in General Duty and

was posted at 68 Filed Regiment (Parbat Ali), New Bowenpally, Secunderabad Cantonment and he was 21 years old and the sole earning member in their family and he has got unblemished record of service for the four years and trying to become a good soldier in the service of the nation. However, it has been pointed out that the Army Authorities in stead of utilizing his services to the Army duties, deputed him on helper duty to perform all menial jobs like a private servant in the house of the Commander. Though, he has performed such service of three years, later he expressed his inability to continue further and requested for service duties which has irked the Commanding Officer i.e., respondent No.2 herein. The 2nd respondent foisted a false case of theft against the petitioner on the allegation that on 03.10.2006 the petitioner removed the ATM card of one Mr. Ravichander Vidyasagar and withdrew a sum of Rs.23,000/- (Rupees twenty three thousand) in two installments on the same day. It is further stated that he contacted one Baba, who gives clue on theft cases whereupon the said Baba gave a lime and told him that all the people who were suspected should touch the lime. It is further stated that on 09.10.2006 he found a sum of Rs.18,500/- (Rupees eighteen thousand five hundred only) was lying on the top of a mosquito net of one Sivanandan and on the same day all the finger prints of all the people were to be taken and it was stated that the petitioner has confessed the stealing of ATM card and returned the balance money. Thereafter, the second respondent ordered for recording of summary of evidence without giving any

proper opportunity to cross examine the planted witnesses. Thereafter a Summary Court Martial was convened by the 2nd respondent as per the proceedings dated 13.01.2007 fixed the summary court martial at 11.00 hours on 20.01.2007 and on the same day it was recorded that the petitioner has pleaded guilty and the same was recorded and if he has accepted the allegations and consequently awarded the punishment of dismissal from service and three months rigorous imprisonment in civil prison and on the same day the petitioner was sent to Central Jail, Chanchalguda and now he is lodged in the Jail from 20.01.2007. The said intimation was given to the deponent mother by the respondents. Even though she and other relatives to see his son in the prison, her son was reluctant to show his face. Therefore, she went to her native place and after difficulty with the help of prison staff after being convinced, her son turned up to see her and handed four pages of written information in Telugu conveying what all had happened to him in the hands of the second respondent. It has been contended that the entire such procedure as conducted by the second respondent in the Summary Court Martial is contrary to the mandate as provided under 52 and 22 of the Army Rules as there is no proper recording of the alleged plea of guilty nor there is any prior permission and no opportunity was given to the petitioner to cross examine the witnesses and the Officer was biased which caused to the root of the case and therefore the entire enquiry is vitiated. Further, the order of the dismissal from service and the rigorous imprisonment of 3 months is totally disproportionate and shocking the conscience of the court. The allegation that

the petitioner has taken away ATM card is denied. Further, there has been a total miscarriage of justice caused to the petitioner in conducting such a Summary Court Martial and convicting him. Hence, the Writ Petition.

In the detailed counter-affidavit filed on behalf of the respondents, the entire allegations have been denied and further reiterated that the Court Martial has been conducted the enquiry in due procedure as contemplated under the law and there is no such denial as pointed out by the petitioner. It has been further stated that having regard to the plea of guilty which was recorded, sentence was ordered. Therefore, there is no illegality. Apart from denying each and every allegation as stated in the affidavit filed in support of the Writ Petition, it is case of the respondents that the petitioner cannot straight away invoke the jurisdiction of this Court under Article 226 of the Constitution of India and more so seek a Writ of Habeas Corpus especially where the petitioner has got alternative remedies available under the very Rules or Army Act and Rules which he has not opted for and having regard to the Court Martial Proceedings, question of seeking any indulgence more so granting any relief as sought does not arise.

With these detailed allegations made in respect of the affidavit and the counter-affidavit in the above Writ Petition and also after hearing the counsel on both the sides, the only question which falls for consideration in this Writ Petition is as to whether on the facts and circumstances the petitioner is entitled of rht relief as sought for ?

There is no dispute in regard to the aforesaid chequered events whereby the petitioner has been convicted and sentenced by way of dismissal from service and three months rigorous imprisonment by holding a Court Martial proceedings by the second respondent on the allegation of theft of ATM card which he has misused by withdrawing the amounts. The said ATM card belongs to a third person. There is no denial to the fact that there has been a theft of the said ATM card and there is withdrawal. It is the case of the 2nd respondent as evident from the proceedings that in the enquiry, the petitioner himself has pleaded guilty and which has been recorded and it is on the basis, such punishment was awarded. On the face of it, the proceedings under which the petitioner has been subjected is a regular proceedings as contemplated under the Army Act and Rules framed there under. Though several other contentions sought to be urge don behalf of the petitioner as to violation of the Rules 52 and 22 of the Army Rules apart from the disproportionate punishment and did not record due objections, these matters which could form part of the regular proceedings in a challenge made before an appropriate Authority as contemplated under the Rules but not by way of any Writ Petition under Article 226 of the Constitution of India. The proceedings are in the nature of disciplinary action and the same has been culminated into a final order as a result of which the said sentence has been imposed and the petitioner has already been lodged in the jail in pursuance of such sentence but not otherwise. Therefore, *prima facie* we are of the view that the very Writ

Petition seeking a Writ of Habeas Corpus is not maintainable. In this connection, it is relevant to note the principles as laid down in **Kanu Sanyal v. Dist. Magistrate, Darjeeling**[1] where it has been held that:

> "A Writ of Habeas Corpus cannot be granted when a person is committed to jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal."

In view of the same, the very relief as sought for is not maintainable. No other reason has been pointed out as to why the petitioner could not avail the remedies as available under the aforesaid Rules. In the counter-affidavit filed by the respondents herein, they have specifically stated that as against such Summary Court Martial Proceedings, the petitioner can avail alternative remedy under Section 164 read with para 365 of Regulations for the Army (1987 Edition) to the Authorities superior in command to the reviewing authority i.e., General Officer Commanding, 54 Infantry Division in the present case. Therefore, there is no serious denial in regard to such availability of remedies under the very law in respect of which complaint is sought to be made out in this Writ Petition. In **H. Kondal Reddy v. Central Bank of India, Hyderabad**[2]**,** the Full Bench of this Court has held that:

> "In the departmental enquiry when the delinquent in the disciplinary proceedings admits his guilt, it is not open to him to resile from the said admission subsequently."

In **Uttaranchal Forest Development Corporation v. Jabar Singh**[3]**,** it was held that:

> "When the petitioner has not availed the alternative remedy available under the law, High Court is not justified in entertaining the Writ Petition"

In view of the aforesaid principles, it is too premature for the petitioner herein to approach this Court especially by a Writ of Habeas Corpus assailing the said proceedings. It is needless to mention that all the objections, which are now sought to be urged, in this Writ Petition, can as well be taken up in the appropriate proceedings at the instance of the petitioner before such competent authority as contemplated under the Law. In these circumstances, we hold that *prima facie* and on the face of it, the very Writ Petition is not maintainable and does not merit any consideration.

The Writ Petition is accordingly dismissed. However, it is needless to mention that it shall always open to the petitioner to avail all such remedies as available under the law and raise all objections, which will be taken up and disposed of on merits in accordance with law by the competent authority uninfluenced by any of the observations made in these proceedings. No costs.

B. PRAKASH RAO, J

M. VENKATESWARA REDDY, J

30th April 2007.
Chvn.

[1] AIR 1974 Supreme Court 510

[2] 2002 (1) ALD 280 (FB)

[3] (2007) 2 Supreme Court Cases 112